IN THE

SUPREME COURT OF THE UNITED STATES

No. 638. OCTOBER TERM, 1939.

APEX HOSIERY COMPANY, a Pennsylvania Corporation,
Petitioner,

v.

WILLIAM LEADER and AMERICAN FEDERATION OF FULL FASHIONED HOSIERY WORKERS, Philadelphia Branch No. 1, Local No. 706,
Respondents.

RESPONDENTS' BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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CASES CITED

STATUTES

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STATEMENT OF THE CASE

The Apex Hosiery Company, a Pennsylvania Corporation, petitioner, brought this civil action in the District Court for the Eastern District of Pennsylvania, against the respondent Union; William Leader, its President; Joseph Burge, its Vice-President; Harry Omeig, its Treasurer; and Huey Brown, its Secretary; claiming to recover losses to

its property and business sustained by reason of a sit-down strike at its plant, from May 6, 1937, until June 23, 1937, when the strikers left the plant, in compliance with an injunction issued by Judge Kirkpatrick, following the decree of the Circuit Court of Appeals. (See: Apex v. Leader, 90 Fed. (2d) 155.) There is no diversity of citizenship in this case. The cause of action is based upon Section 4 of the Clayton Act.

The Apex Hosiery Company has a plant in Philadelphia, in which, during 1937, it employed about 2500 workers (R. 101). The plant produced about 100,000 dozen pairs of women's hosiery per month (R. 102, 107, 1215). The Company shipped about 85% of its production into other states (R. 109). There is no evidence that the Union had knowledge of these facts.

Prior to the sit-down strike, the plant was operated as an open shop (R. 110).

About the middle of April, 1937, Leader sent a letter to Apex, enclosing a form of contract, which provided, inter alia, for the closed shop, more properly referred to as the "all union shop" (R. 120).

On May 6, 1937, union members employed in other mills in the City of Philadelphia, stopped work for the purpose of coming to the Apex Plant (R. 82, 98). However, the plant had closed down at or about 1:00 o'clock p. m., upon orders issued by Meyers, President of the Apex Company (R. 126, 257), and all workers had gone except maintenance and office workers. Beginning about 2:00 p. m. o'clock on May 6, 1937, thousands of people gathered around the mill (R. 126, 216).

Leader was seen on the steps outside of the mill. He requested admission for the purpose of conferring with

Meyers. A conference was refused (R. 127). Leader was heard to declare in a loud voice, "A strike and a sit-down" (R. 128). Immediately thereafter, stones were hurled through the windows, the doors were smashed and the crowd surged into the plant (R. 261); machines, equipment, furniture and merchandise were damaged (R. 128); Meyers, the President, and Struve, the General Superintendent of the plant, as well as other employees were assaulted and injured. The jury found that the Union was not responsible for the violence and damage committed on May 6, 1937 (R. 1365).

Leader was sent for and he came into the mill with a committee of Apex workers, and asked Meyers to sign an agreement (R. 129). Meyers refused to sign the agreement.

From May 6 to June 23, 1937, about 150, or more, Apex employees (R. 265) remained in the plant on a "sit-down" strike (R. 138-139, 242, 264, 325), which was authorized and supported by the Union (R. 1363-1364) for the purpose of obtaining an "all union shop" agreement (R. 305).

On June 21, 1937, the Circuit Court of Appeals reversed the decree of the District Court and ordered Judge Kirkpatrick to issue a sweeping injunction, commanding the sit-downers to evacuate the plant, and restraining the union and its membership from various forms of activity, (Apex v. Leader, 90 Fed. (2d) 155), and on June 23, 1937, the strikers left the plant (R. 139-140).

The jury was told by the learned Trial Judge below that the Circuit Court of Appeals held in its former opinion that there was an intention to restrain commerce and to violate the Sherman Act (R. 140).

During the occupancy of the plant by the sit-downers, none of the officers of the Company were permitted to per-

form their duties in the plant (R. 271). Only watchmen (R. 295) and maintenance men (R. 311) were allowed into the plant (R. 296). The locks on the doors leading into the plant were changed by the sit-down strikers. Machines in the plant were damaged on June 10, 1937 (R. 297-298, 420, 422) and on June 23, 1937 (R. 144, 299, 433, 442). During the period of the sit-down strike, the Company was unable to carry on any operations, and due to the fact that the machines had been damaged, the plant was not able to begin production until August 19, 1937, and full production was not achieved until November 1, 1937 (R. 146).

On May 6, 1937, there was on hand in the plant a total of 130,000 dozen of finished merchandise and merchandise in the greige (undyed and unfinished) (R. 145). There is testimony that counsel for the Company requested Leader to permit them to go into the plant for the sole purpose of removing the finished merchandise, so that it could be shipped against orders, and that Leader refused (R. 619, 620). Leader denied this. There was no evidence that the Union actually authorized the alleged refusal or had knowledge of the request, or the refusal.

Machines were damaged by actual violence (R. 296), and due to lack of use (R. 273).

The petitioner proved damages to plant, equipment, and merchandise which occurred on May 6, 1937, amounting to $26,490.12 (R. 1358), which was not allowed by the jury (R. 1365).

The petitioner proved damage to plant, machinery, and merchandise between May 6 and June 23, 1937. The jury allowed $82,644.59 on this item (R. 1361, 1364).

The petitioner proved overhead expenses in the sum of $122,742.95 (R. 968).

The Company proved that it had earned profits from January 1, 1937 to May 6, 1937, at the rate of $6,111.00 per week (R. 1164, 1358). The Company had operated at a loss during the years 1933, 1934, 1935 and 1936 (R. 1172-1173). A general slump in the market occurred during the last six months of 1937 (R. 1247, 1263). However, more hosiery was sold during 1937 than 1936 (R. 1261). In 1936 the annual national shipments were 37,400,782 dozen pairs. In 1937, the annual national shipments were 39,678,494 dozen pairs of hosiery (R. 1261). The productive capacity of all the full fashioned hosiery mills in the United States was 8,000,000 or 10,000,000 dozen pairs *more* than the sales (R. 1233-1234). There was no change in prices (R. 1195-1196).

At the conclusion of the petitioner's case, the respondents moved that the case be dismissed, which motion was denied (R. 628). At the conclusion of the entire case, the respondents filed a motion for a directed verdict for the defendants, in accordance with Rule 50 (b) of the New Rules of Federal Practice, which motion was denied (R. 1305, 1348).

The jury was given a list of questions propounded by the learned Trial Judge in the nature of special findings of fact (R. 1354-1357, 1363, 1367).

The jury returned a verdict for the petitioner and against the respondents. As to the defendants Joseph Burge, Vice-President; Harry Omeig, Treasurer; and Huey Brown, Secretary of the Union, the jury found for the defendants and against the plaintiff (R. 1361). A motion was made that the verdict be trebled, and this was done (R. 1363). A judgment was entered on the trebled verdict in the sum of $711,932.55, together with counsel fees in the sum of

$25,000.00, allowed by the Court, and costs to be taxed (R. 1368).

The respondents filed a motion to set aside the verdict and judgment against them (R. 1369) and also a motion and reasons for new trial (R. 1370-1388). The learned Trial Judge below dismissed the motions and his opinion appears at R. 1389-1391.

On appeal the Circuit Court of Appeals, in an opinion filed Nov. 29, 1939. (R. 1399-1417) reversed the judgment and remanded with instructions to enter judgment for the respondents herein.

The petitioner filed a petition for rehearing (R. 1421-1436) and same was denied on Dec. 27, 1939 (R. 1437).

ARGUMENT

I. Introductory.

The facts in this case clearly establish that the activities of the employees were purely local and therefore beyond the orbit of the federal power; and further, apart from the question of federal jurisdiction, that they do not constitute a conspiracy *in restraint of interstate commerce.*

It is really not necessary to consider the second portion of the foregoing statement in order to dispose of this case. If the facts alleged to support the claim of federal jurisdiction are legally insufficient, then the action should not be entertained: *Levering v. Morrin*, 289 U. S. 103. The only reason the lower court did proceed to trial is that it was of the erroneous opinion that it was bound by the former decision of the Circuit Court of Appeals. Were it not for this, the case would have been dismissed by the learned trial judge. This is clear from his opinion in which he referred to the decision of the Circuit Court in *Apex v. Leader*, 92 F. 2nd 155 and said:

> "its decision can only mean that, as a matter of law, the requisite intent is conclusively presumed from the seizure of the plant by the defendants and the consequent stopping of production and shipment of goods." (R. 1389-1390).

Because this case turns on the lack of jurisdiction, we will not in this brief enter into a full analysis of the Sherman Anti-Trust Act (Act of 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. Sec. 1), its purpose, its legislative origin, and the decisions of this Court, to show that the Anti-Trust

Acts have been erroneously applied to labor disputes (se
"*The Sherman Act and Labor Disputes*" by Louis B. Bou
din in Columbia Law Review, December 1939 and Januar
1940), and that due to the recent labor legislation, the Anti
Trust Act either cannot be applied to labor disputes or a
least should not be applied to activities similar to thos
present in the case of *Lowe v. Lawlor*, 208 U. S. 274; *Se con
Coronado Coal Case*, 268 U. S. 295; *Duplex v. Deering*, 25
U. S. 443; and *Bedford Stone Cutters Case*, 274 U. S. 3
No doubt a proper case will soon be brought to this Cou
which will permit a re-examination of the entire problem
But it is respectfully suggested that the facts in this cas
do not permit or necessitate that task. This case was prop
erly decided by Circuit Court as one within those decision
by this Court holding that a local strike does not com
within the federal power nor violate the Anti-Trust Act.

II. Unless the Local Strike Activities Are Part of
Conspiracy Aimed at Interstate Commerce and Vitalize
by an Intent To Monopolize the Supply of the Articl
Entering and Moving in Interstate Commerce or To F
the Price of it in Interstate Markets, the Local Strik
Activities Are not Within the Reach of the Federa
Power under the Sherman Anti-Trust Act.

(a) *Local Activities of Employees on Strike Are n
Within the Reach of the Federal Power.*

The facts of this case establish that there occurred a si
down strike in the petitioner's mill. The case is square
within the decisions of this Court in the *First Coronad
Coal Case*, 259 U. S. 344; *United Leather Workers v. H
kert & Meisel*, 265 U. S. 457; and *Levering & Garrigues
Morrin*, 289 U. S. 103.

In the *First Coronado Coal Case* this Court held that mining was not interstate commerce, that the power of Congress did not extend to its regulation as such and that the activities there involved—a local strike—did not bring them within the broad provisions of the Anti-Trust Act. Chief Justice Taft found that the strike there involved was

> "local in its origin and motive, local in its waging, and local in its felonious and murderous ending." (p. 412)

In *United Leather Workers v. Herkert & Meisel*, 265 U. S. 457, the Court rejected a claim that the strike there involved and carried on through illegal picketing and intimidation of workers was in violation of the Anti-Trust Act, despite the fact that 90% of the output of the plant was normally shipped in interstate commerce and pointed out that the natural, logical and inevitable consequences of the contention there made (similar to that of the petitioner here)

> "will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to federal jurisdiction, provided any appreciable amount of its product enters into interstate commerce * * * We cannot think that Congress intended any such result in the enactment of the Anti-Trust Act, or that the decisions of this Court warrant such construction."

This Court held in that case, at p. 471, that there was no such intent as is required to make out a violation of the Anti-Trust Act nor were the necessary effects upon interstate commerce such as

> "to enable those preventing the manufacture to

monopolize supply, control its price, or to discriminate as between would-be purchasers."

The Court held further, p. 471, that

> "the mere reduction in the supply of an article to be shipped in interstate commerce by *illegal or tortious prevention of its manufacture* is ordinarily an indirect and remote obstruction to that commerce." (Italics ours).

See also *Levering & Garrigues v. Morrin*, 289 U. S. 103 and *Industrial Association v. United States*, 268 U. S. 64.

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, this Court reviewed the labor cases which involved the Anti-Trust Act, to show the breadth of the federal power under the commerce clause and the conditions under which the federal power had been exercised with relation to the activities of employees engaged in production, and in this connection, said:

> "Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. *Loewe v. Lawlor*, 208 U. S. 274; *Coronado Coal Co. v. United Mine Workers, supra; Bedford Cut Stone Co. v. Stonecutters Association*, 274 U. S. 37. See, also *Local 167 v. United States*, 291 U. S. 293, 297; *Schechter Corporation v. United States, supra.* The decisions dealing with the question of that application illustrate both the principle and its limitation. Thus in the *First Coronado Case*, the Court held that mining was not interstate commerce, that the power of Congress did not extend to its regulation as such, and that it had not been shown that the activities there involved—a local strike—brought them within the provisions of the Anti-Trust Act, notwithstanding the

broad terms of that statute. A similar conclusion was reached in *United Leather Workers v. Herkert, supra, Industrial Association v. United States, supra,* and *Levering & Garrigues Co. v. Morrin,* 289 U. S. 103, 107. But in the *First Coronado Case,* the Court also said that 'if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint.' 259 U. S. p. 408. And in the *Second Coronado Case* the Court ruled that while the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the 'intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.' 268 U. S. p. 310. And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees' conduct. *Industrial Association v. United States,* 268 U. S. p. 81. What was absent from the evidence in the *First Coronado Case* appeared in the *Second* and the Act was accordingly applied to the mining employees." (Italics ours)

This Court referred to those cases where the Anti-Trust t had been applied merely to show that the federal power l been deemed broad enough to include local activities, only when they were part of a conspiracy with intent restrain or control the supply or to fix prices in inter- te markets.

In the *Second Coronado Coal Case*, 268 U. S. 295, this Court held that the additional evidence produced in the second trial showed an intent "to restrain and control the supply of coal moving in interstate commerce," and applied the Anti-Trust Act to the conspirators. *It was the suppression of competition in the interstate markets for the purpose of maintaining prices which constituted the conspiracy in restraint of commerce and not the violent strike activities which brought the Anti-Trust Act into play in that case.*

In the case at bar the requisite intent was neither alleged nor proved. There was nothing more than concerted action to unionize the mill by means of a sit-down strike with the intent and purpose of preventing the petitioner from carrying on its business. As this Court said in the *Herkert case*:

> "It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainant to yield to demands in respect to the terms of employment."

It is respectfully submitted that the facts in this case do not make out a violation of the Sherman Anti-Trust Act and therefore the district court had no jurisdiction.

(b) The Jury Did not and Indeed Could not Find the Requisite Intent. The Jury Found an Intent To Conduct a Sit-down Strike.

The Circuit Court of Appeals in reversing the judgment entered in the District Court committed no error. Sufficient has been said herein to show that there was no conspiracy with intent to monopolize the supply of hosiery entering and moving in interstate commerce or to fix the price of it in the interstate markets. The case was presented to the jury on the erroneous theory that the intent to conduct

a sit-down strike in a mill which normally receives raw materials from outside the state and ships 85% of its merchandise into other states raises a conclusive presumption of intent "to restrain commerce". No proof was adduced of a conspiracy with intent to unduly restrict competition in interstate hosiery markets by monopoly of supply or by price fixing, nor were the consequences of the sit-down strike such as to compel an inference of such intent.

The Apex Hosiery Company produced about 100,000 dozen pairs of hosiery per month, in an industry which had a total national sale in the year 1937 of approximately forty million dozen pairs of hosiery, and which industry had at that time a productive capacity of about forty-eight million dozen pairs. The stoppage of production at Apex for the period of the sit-down strike had no effect whatsoever upon competitive opportunities in the hosiery markets, or the prices of hosiery in interstate markets, nor was the available supply of hosiery curtailed whatsoever. As a matter of fact, more hosiery was sold during 1937 than during 1936. (R. 1261).

It is plain therefore that "the combination was not such that by reason of the intent of the conspirators or the inherent nature of their acts, public interest was prejudiced by unduly restricting competition or obstructing trade. Appalachian Coals, Inc., supra. Nash v. United States, supra." (R. 1413, Opinion of Circuit Court).

The petitioner contends however that the refusal by the respondent Leader to permit entry into the mill for the purpose of removing hosiery so that it could be shipped against orders constitutes the crucial fact of sufficient substance to turn the entire case into a conspiracy "in restraint of commerce".

Although the petitioner, on page 11 of its argument in

support of its petition, states that the union respondent repeatedly refused to grant the petitioner's request for permission to remove and ship $800,000 of *finished merchandise* from its factory, the record does not support that statement. The record shows that there was on hand in the plant on May 6, 1937, the date of the beginning of the strike, a total of 13,000 dozen of *finished and unfinished* merchandise (R. 145). *There is no evidence of how much of this was finished.* Furthermore, the respondent Leader, not the union, uttered the refusal (R. 620). There is no evidence that the union actually authorized the alleged statement of refusal or ratified Leader's alleged refusal, or that it had actual knowledge of it. (Section 6 of Norris LaGuardia Act, 29 U. S. C. A., Sec. 101)

However, it is clear that this is not a violation of the Anti-Trust Act.

In the *First Coronado Coal Case*, the following appears at p. 411:

> "The circumstances that a car loaded with coal and billed to a town in Louisiana was burned by the conspirators has no significance upon this head. The car had been used in the battle by some of Bache's men for defense. It offered protection and its burning was only a part of the general destruction."

See also *Industrial Association of San Francisco v. United States*, 268 U. S. 64, referred to in the opinion of the Circuit Court below at R. 1414.

If it is not a violation to engage in unlawful picketing to prevent the normal operations of a factory which customarily ships 85% of its product into other states, and if it is not a violation to burn a "car loaded with coal and billed

to a town in Louisiana", then surely the refusal by Leader does not constitute a violation. Particularly is this true when we consider that here the goods were not even in transit. It cannot be said that this refusal by Leader prejudiced the public interests by unduly restricting competition or unduly obstructing the course of trade; *Sugar Institute, Inc. v. United States*, 297 U. S. 553; *Appalachian Coals, Inc. v. United States*, 288 U. S. 344.

Moreover, the damages the petitioners sought to recover did not result from this refusal. The petitioner sought to recover damages for injury to its property, loss of overhead charges and estimated profits it claimed it would have earned had it operated its plant. It did not prove any loss resulting from the refusal.

Returning to the petitioner's contention that the Circuit Court erred in reversing because the jury found intent and such finding is amply supported by the evidence. It is abundantly clear that the evidence supports no finding of the requisite intent. And it is equally true that *the jury made no such finding.* The following is ample proof of this unequivocal statement:

(a) The case was tried upon the erroneous theory propounded by the petitioner and adopted by the Circuit Court in its opinion reported in 90 F. (2d) 155, that a sit-down strike raises a conclusive presumption of an intent to restrain commerce.

(b) The learned Trial Judge refused to charge the jury in accordance with the defendants points for charge as to the meaning of "restraint of commerce" as that term has been interpreted by the Supreme Court. (R. 1341, 1350)

(c) The special findings of the jury do not contain a question of that nature.

(d) The learned Trial Judge submitted the question of intent to conduct a sit-down strike and the jury found that the Union defendant did intend that kind of a strike. (R. 1363)

(e) Even if the court had submitted the question of intent under proper explanatory instructions to the jury, there is no evidence to support a finding of the specific intent required under the Second Coronado Coal case.

(f) In his charge to the jury, the learned Trial Judge said:

> "The facts involved in this case have been ruled upon by the Circuit Court of Appeals in that regard, and the law as declared by the Circuit Court of Appeals requires me to say to you that if you find the defendants did the things which they are charged with doing, then, without further proof of their intent, you may find from those facts that the defendants did intend to restrain interstate commerce." (R. 1314-1315)

The learned trial judge made this point clear in his opinion denying the motion to set aside the judgment: See R. 1389-1390 hereinabove quoted in the Introductory statement to this brief.

That the theory of the petitioner's case is that a sit-down strike raises a conclusive presumption of intent to "restrain" commerce in the manner prohibited by the Anti-Trust Act is further confirmed by its argument that the Na-

tional Labor Relations Act cases sustain such a legal conclusion.

It is respectfully submitted, therefore, that the Circuit Court of Appeals did not invade the province of the jury, but performed an essential judicial function in reversing the judgment entered on the verdict.

III. The National Labor Relations Act and the Decisions of this Court Upholding its Constitutionality Have not Expanded the Meaning of "Commerce" nor Extended the Application of the Anti-Trust Act.

The second point advanced by the petitioner (pp. 14-17 of petition) proceeds on the assumption that by holding the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A., Sec. 151 et seq.) constitutional and applicable to activities in manufacturing plants, the federal power has been enlarged, the meaning of "in restraint of commerce" changed, and the application of the Anti-Trust Act expanded, so that now if unfair labor practices in a plant such as Friedman-Harry Marks Clothing Co. or Fainblatt are within the federal power, because they "led or tend to lead to a labor dispute burdening or obstructing commerce", then a strike which actually stops production and the flow of goods into and out of the plant must necessarily be within the federal power under the Sherman Act.

The fallacies which infect this contention are many. In the first place the problems involved in a determination of the *constitutionality* of an Act of Congress are different from the problems involved in a determination of the *application* of an Act of Congress.

Although Congress is constitutionally empowered to protect commerce from recurrent local practices which affect commerce directly, it is not incumbent upon Congress to reach all the evils within its field of action. The National Labor Relations Act cases merely affirmed the constitutionality of that Act upon a well established principle clearly set forth in many cases.

In the *First Coronado Case*, *supra*, the court in denying that the Anti-Trust Act could be applied to a local strike said at p. 408

> "if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint."

In the very case relied on by the petitioner, namely *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 39, 40, the court reiterated the principle upon which Congress could constitutionally deal with local activities. (See excerpt therefrom, supra.)

The same argument now advanced by the petitioner in this case was rejected by this Court in the *Herkert case*, *supra*, as follows:

> "The cases of *Stafford v. Wallace*, 258 U. S. 495 and *Chicago Board of Trade v. Olsen*, 262 U. S. 1, are also supposed in some way to sustain the view that a strike against the manufacture of commodities intended to be shipped in interstate commerce, is a conspiracy against that commerce. What those cases decided was that when Congress found from investigation that more or less constant abusive practices in a course of business usually within state police cognizance, threaten to ob-

struct or unduly to burden the freedom of interstate commerce, it could by law institute supervision of such course of business in order to prevent the abuses having such effect. As said in *Stafford v. Wallace* (p. 520): 'The *reasonable fear by Congress* that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably, and more or less constantly, be used in conspiracies against interstate commerce, or constitute a direct or undue burden on it, expressed in this remedial legislation, *serves the same purpose as the intent* charged in the *Swift* indictment, to bring acts of a similar character into the current of interstate commerce for federal restraint.'" (Italics supplied)

The crucial words in the National Labor Relations Act are "affect commerce".

"Congress did not attempt to deal with particular instances. It created for that purpose the National Labor Relations Board. In conferring authority upon that Board, Congress had regard to the limitations of the Constitutional grant of Federal power. Thus, the 'commerce' contemplated by the Act * * * is interstate and foreign commerce. The unfair labor practices which the Act purports to reach are those *affecting that* commerce * * * And whether or not a particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to Federal control is left to be determined as individual cases arise."

Consolidated Edison Co. v. NLRB, 305 U. S. 195.

The question in the Consolidated Edison Case was really

whether the Board had exceeded the limits of Federal power, that is—whether the employer and its employees were within such relation to interstate commerce that an unfair labor practice in that plant would "affect commerce."

The principle was made even more explicit in *National Labor Relations Board v. Fainblatt*, 306 U. S. 601. In that case, the Court held:

> "The power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate."

The point at issue in that case was whether or not, in view of the small size of the employer's business, the Federal power could be extended over it. The Court pointed out in Note No. 1 that the power of Congress, whether exerted under the Wagner Act or any other Act, extends to those intrastate activities which, if permitted, would result in restraint of interstate commerce. As an illustration of the extent of Federal power, the Court cited the *Second Coronado Coal Case*, the *Stone Cutters Case*, and *Local No. 167*. These cases were cited merely to illustrate that the Federal power under the Sherman Act, may extend to activities which are wholly and purely intrastate.

The Court did not mean, and no such meaning can be extracted from these latter Labor Board Decisions, that the meaning and application of the Sherman Act has been altered.

In the Labor Board cases, since the statute leaves to the Board, subject to judicial review, the question of jurisdiction, the test of the application of the Act to a particular employer is the existence "of a relationship of the em-

ployer and his empolyees to the commerce, such that, to paraphrase Section 10 (a) in the light of constitutional limitations, unfair labor practices have led or tend to lead 'to a labor dispute burdening or obstructing commerce.' " *N. L. R. B. v. Fainblatt,* (supra).

> "It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow are within the reach of the governmental power * * * Whether or not particular action does affect commerce in such a close and intimate fashion, as to be subject to Federal control and hence lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. *We are thus to inquire whether in the instant case, the Constitutional boundary has been passed.*" (Italics ours) *Jones & Laughlin Case,* 301 U. S. 1.

The same problem concerned the Court in the *Santa Cruz Case,* 303 U. S. 453. The Employer in that case contended that in view of the nature of its business, it did not lie within the field of Federal power. In answer to that contention, the Court said:

> "The *power of Congress* extends not only to the making of rules governing sales of petitioners produced in interstate commerce, as for example with respect to misbranding under the Federal Foods and Drug Act, or with respect to forbidden discrimination in price under the Clayton Act, but also to the *protection of that interstate commerce from burdens, obstructions and interruptions, whatever may be their source.* Second Employers' Liability Cases, 223 U. S. 1, 51. The close and intimate effect which brings the subject within the reach of Federal power may be due to activi-

ties in relation to productive industry, although that industry, when separately viewed, is local. It is upon this *well established principle* that the constitutional validity of the National Labor Relations Act has been sustained. NLRB v. Jones & Laughlin, 301 U. S. 1, 38." (Italics ours)

Santa Cruz Fruit Packing Co. v. NLRB, 303 U. S. 453.

It is too clear for further argument that whereas the Sherman Act is directed at conspiracies or combinations which impair the freedom of competition in interstate markets and whereas local activities come within the federal power under that Act only when they form part of a plan involving monopoly of supply or price fixing, the National Labor Relations Act is aimed at local activities which *affect commerce*.

Activities which directly and substantially "restrain" commerce under the Anti Trust laws are different in nature from unfair labor practices which "affect commerce" under the National Labor Relations Act.

In *Blankenship v. Kurfman*, 96 F. (2d) 450, CCA 7th, a similar argument was disposed of by the Court as follows:

> "The recent decisions in cases under the National Labor Relations Act are instructive for the purpose of determining whether certain activities *affect commerce*. These cases do not involve problems of determining the existence of a conspiracy or combination *in restraint of commerce*." (Italics ours).

The term "in restraint of commerce" is a term of art well known in the law for generations before the Anti-Trust Act was passed. It's nature has been made reason-

ly clear in the decisions by this court and the activities hich constitute a conspiracy "in restraint of commerce" e qualitatively different from activities which merely ffect commerce".

If the contention of the petitioner is legally correct, en section 13 of the National Labor Relations Act has en rendered meaningless. Section 13 of the National abor Relations Act specifically provides;

"Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

his section appears in the Act, despite the finding in ection 1 that strikes materially affect, restrain, and con- ol the flow of goods in the channels of commerce.

In conclusion on this point, it is respectfully submitted at the Circuit Court of Appeals, was entirely correct in s conclusion that the effect on interstate commerce in e case at bar was indirect and remote and in refusing to tablish an equivalence between the terms "in restraint commerce" and "affect commerce".

. The Circuit Court Did not Err in Holding that Substantial Amount of the Commodity Must Be Involved in a Violation of the Anti-Trust Act.

It is respectfully submitted that the Circuit Court did t err in reversing the judgment on the ground that ere was no federal jurisdiction over the local strike rely because the Court went further and showed that ere can be no violation of the Sherman Act unless the lume of commerce involved is substantial. If a substan- l amount is not involved there can be no monopoly of pply or price fixing.

The petitioner seeks to draw a distinction between a violation of Section 1 and Section 2 of the Sherman Act and implies that the amount of the commodity involved may be significant in a monopoly case under Section 2 but that it is irrelevant in a case arising under Section 1. But the statute cannot be thus divided, and no such distinction has been made by this Court.

In *Standard Oil Company v. United States*, 221 U. S. 1, the Court said:

> "There can be no doubt that the sole subject with which the first section deals is restraint of trade as *therein contemplated*, and that the attempt to monopolize and monopolization is the subject with which the second section is concerned. It is certain that those terms, at least in their rudimentary meaning took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the Act in question. * * * (p. 57) It came moreover to pass that *contracts or acts* which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance price—*in other words to monopolize*—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade and therefore as being in *restraint of trade*." (Italics supplied)

And further

> "Having by the first section forbidden all means of *monopolizing trade, that is unduly restraining it*, by means of every contract, *combination, etc.*, the second section seeks, if possible, to make the prohibition of the Act all the more complete and perfect by embracing all attempts to reach the end prohibited by

the first section, that is restraints of trade, by any attempts to monopolize or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about, be not embraced *within the general enumeration of the first section.* And, of course, when the *second section is thus harmonized with and made, as it was intended to be, the complement of the first,* * * *" (Italics supplied).

That this Court has always considered the amount of the commodity involved in all cases involving the Anti-Trust Act, is clear from the following cases.

In the *Appalachian Coals Case, supra,* although the combination controlled 74% of the production in the Appalachian area, it represented but 12% of the coal entering into the interstate market east of the Mississippi. Since "*ample competitive opportunities*" remained the combination was held not to be in violation of the Anti-Trust Act.

In *United States v. Patten,* 226 U. S. 525, the conspiracy was to obtain control of the total available cotton supply and to enhance the price to all buyers in every market in the country.

In the *Sugar Institute Case, supra,* the refiners, represented in the Institute, which was held in violation of the Anti-Trust Act, refined practically all the imported sugar and supplied 70% to 80% of all the sugar consumed in the United States and the combination was condemned because of the "steps taken to secure adherence without deviation to prices and terms announced."

In *Bedford Cut Stone Co. v. Stone Cutters Ass'n,* 274 U. S. 37 there was a secondary boycott but the Court, in

holding that it was a conspiracy aimed directly at interstate commerce said:

> "the present combination deliberately adopted a course of conduct which directly and substantially curtailed or threatened thus to curtail the natural flow in interstate commerce of a *very large proportion of the building limestone production of the entire country* to the gravely probable disadvantage of producers, purchasers and the public; and it must be held to be a combination in undue and unreasonable restraint of such commerce within the meaning of the Anti-Trust Act as interpreted by this court." (Italics ours.)

In the *Second Coronado Coal Case, supra*, not only was the requisite intent present but the Court found that the amount of coal involved was substantial. (In the *First Coronado Case* the evidence showed that the mines which were destroyed produced about 5000 tons per week, but in the *Second Coronado Case* that figure was corrected to show that it was 5000 tons per day.)

In *Local 167 v. U. S., 291 U. S.* 293, the conspiracy *dominated the entire industry* and even cooperated toward the furtherance of the monopolistic control and sale of chicken coops at fixed prices.

> "The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operates *substantially and directly to restrain* and burden the untrammelled shipment and movement of the poultry while unquestionably it is in interstate commerce * * * *The conspiracy was not for a temporary purpose but to dominate a great and permanent business.* It was highly organized and main-

tained by the levy, collection and expenditure of enormous sums * * *. The evidence shows that delegates of the union coerced marketmen to use coops of a company that had or sought to secure a monopoly of such facilities and charged excessive rentals for them." (Italics ours.)

In *Industrial Ass'n of San Francisco v. United States*, *supra*, the Court applied the maxim "de minimus non curat lex".

In *Standard Oil Co. v. United States*, 283 U. S. 163, 169, the Court said:

> "Thus appears that no monopoly of any kind, or restraint of interstate commerce, has been effected either by means of the contracts or in some other way. In the absence of proof that the primary defendants had such control of the entire industry as would make effective the alleged domination of a part, *it is difficult to see how they could by agreeing upon royalty rates control either the price or the supply of the gasoline, or otherwise restrain competition.*" (Italics supplied)

It is therefore established by this court that the amount of the commodity involved is important in any case wherein it is charged that the Anti-Trust Act has been violated. A comparison of the *First Coronado Coal Case*, *supra*, with the *Second Coronado Coal Case*, *supra*, shows conclusively that the amount of the coal involved was deemed of importance by this court.

The petitioner relies upon *Steers v. United States*, 192 F. 1, (1911) and *O'Brien v. United States*, 290 F. 185, (1923), as support for its contention that the amount of the commodity involved is immaterial. The *Steers Case* involved a conspiracy or combination to control the tobacco

supply in the area for the purpose of fixing its price and the interference with the shipment of the four hogsheads of tobacco was merely the overt act which illuminated the conspiracy. The *O'Brien Case* relied upon the *Steers Case* and was decided by the same Circuit Court of Appeals, despite the fact that the cases were entirely different. Nevertheless, the interference in the *O'Brien Case* was with an actual shipment of goods in interstate commerce. The case is therefore, not in point with the case at bar. Furthermore it is respectfully submitted that the *O'Brien Case* is in direct conflict with the decisions of this Court, whereas, the decision of the Circuit Court in the case at bar is consistent with the decisions of this court. The *O'Brien Case* was properly distinguished from the case at bar by the Third Circuit Court of Appeals. It was decided in 1923 and before the various decisions by this court defining the elements of a violation of the Anti-Trust Act.

V. Conclusion.

In conclusion it is respectfully submitted that the Circuit Court of Appeals below committed no error since:

(1) The strike was purely local and its effect on interstate commerce was merely indirect, incidental and remote. Consequently the district court had no jurisdiction.

(2) The National Labor Relations Act and the decisions by this court sustaining its constitutionality and application have not enlarged the meaning of "interstate commerce," nor changed the meaning of "in restraint of commerce".

(3) The jury did not, and indeed could not, find an intent to control or monopolize the supply of hosiery

entering and moving in interstate commerce nor an intent to fix the price of it in interstate markets.

(4) The object of the respondents was to unionize the plant.

(5) The Circuit Court of Appeals properly reversed its former decision because it was clearly and palpably erroneous.

(6) The decision rendered by the Circuit Court is consonant with all of the decisions of this court.

(7) The questions presented by the petitioner have already been decided by this court.

Wherefore it is respectfully submitted that the petition for writ of certiorari should be dismissed.

Respectfully submitted,

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